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IN THE
SUPREME COURT OF THE UNITED STATES

♦

RANDOLPH PURYEAR,
Petitioner,
vs.

SECRETARY OF FLORIDA
DEPARTMENT OF CORRECTIONS,
Respondent.

♦

On Petition for Writ of Certiorari to The United States Court of Appeals For the Eleventh Circuit

♦

PETITION FOR WRIT OF CERTIORARI
PAGES 1 through 65

♦

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals err by denying Petitioner's application for a certificate of appealability under 28 U.S.C. § 2253(c)(2) based on its failure to understand that this Court's *Flores-Ortega* decision established that the *Strickland* prejudice inquiry for ineffective assistance of counsel claims need not be restricted to the forum in which the unprofessional conduct occurred?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner in this case is Randolph Puryear. The Respondent in this case is the Secretary of the Florida Department of Corrections, which is currently incarcerating Mr. Puryear.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT.....ii

TABLES OF AUTHORITIES..... ...v, vi

PETITION FOR WRIT OF CERTIORIARI.....1

OPINIONS AND JUDGMENTS IN THE COURTS BELOW.....2

STATEMENT OF JURISDICTION.....3

STATUTORY AND OTHER PROVISIONS INVOLVED.....4

STATEMENT OF THE CASE.....7

REASONS FOR GRANTING THE WRIT.....56

I. The court of appeals erred by denying Petitioner's application for a certificate of appealability under 28 U.S.C. §2253(c)(2) based on its failure to understand that this Court's *Flores-Ortega* decision established that the *Strickland* prejudice inquiry for ineffective assistance of counsel claims need not always be restricted to the forum in which the unprofessional conduct occurred.

CONCLUSION..... ... 61

TABLE OF AUTHORITIES

Banks v. Dretke, 540 U.S. 668 (2004).....1

Barefoot v. Estelle, 463 U.S. 880 (1983).....56

Carratelli v. State, 961 So.2d 312 (Fla. 2007).....47

Davis v. Secretary for the Department of Corrections, 341 F.3d 1310 (11th Cir. 2003)(per curiam).....58-59

O'Connell v. State, 480 So.2d 1284 (Fla. 1985).....33

Puryear v. State, 891 So.2d 2 (Fla. 2nd DCA 2004).....2, 44-45, 61

Roe v. Flores-Ortega, 528 U.S. 470 (2000).....55-58, 60-62

Shaw v. Dwyer, 555 F.Supp. 2d 1000 (E.D. Mo. 2008).....59-60

Slack v. McDaniel, 529 U.S. 473 (2000).....51

Strickland v. Washington, 466 U.S. 668 (1984).....54

Williams v. Taylor, 529 U.S. 362 (2000) 52

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. VI 4

STATUTES:

28 U.S.C §2253.....5

PETITION FOR WRIT OF CERTIORARI

Randolph Puryear respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered in *Randolph Puryear v. Secretary, Department of Corrections*, Case No. 10-13923-1, in that court on January 4, 2011, which denied Petitioner's application for a certificate of appealability under 28 U.S.C. §2253(c)(2). *See Banks v. Dretke*, 540 U.S. 668 (2004) (decision by this Court holding that a state habeas petitioner was entitled to a certificate of appealability).

OPINIONS AND JUDGMENTS IN THE COURTS BELOW

A copy of the order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's application for a certificate of appealability is contained in the Appendix (App. 4). Also included in the Appendix are the district court's orders denying Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 and further denying a certificate of appealability (App. 7); the Second District Court of Appeal's decision in *Puryear v. State*, 891 So.2d 2 (Fla. 2nd DCA 2004), affirming Petitioner's conviction and sentence (App. 36); and the post-conviction court's decision denying Petitioner's ineffective

assistance of counsel claim brought under Fla.R.Crim.P. 3.850 (App. 44).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition was timely filed pursuant to Sup.Ct.R.13, within 90 days of the Court of Appeal's order denying a certificate of appealability.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The basis for federal jurisdiction in the district court was 28 U.S.C. §2254 and federal question jurisdiction under 28 U.S.C. § 1331.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of the Counsel for his

defense.

28 U.S.C. § 2253:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity or a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a

certificate of appealability, an appeal may not be taken to the court or appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by

paragraph (2).

STATEMENT OF THE CASE

A. Statement of The Facts

1. Introduction

Petitioner/Defendant Randolph ("Randy") Puryear was charged in Hillsborough County, Florida in a one count information with second-degree homicide with a firearm, two counts of aggravated assault, and carrying a concealed firearm. The jury returned a verdict of guilty on all four counts. Puryear was sentenced to twenty-five years imprisonment on the homicide count and concurrent five-year sentences on the remaining counts on December 20, 2002. The defendant filed a timely notice of appeal. Puryear

is serving his sentence at Blackwater River Correctional Facility in Milton, Florida.

2. The Evidence at Trial

Jamale Wells died of a gunshot wound sustained during a four-person struggle in a cul-de-sac near his residence. The gunshot was the culmination of an escalating series of four violent encounters that had occurred that day, at that location, prior to the gun discharging.

a. The first violent encounter

On the day in question, Wells went to the residence of a neighbor, Dennis Wall, to watch a

Tampa Bay Buccaneers football game on television. TT 1726-1727, 1797, 2149-2150.[1] They were joined by David Fish, Sr. TT 1726, 1797, 2150. All three men drank beer throughout the game. TT 1727-1729, 1792-1794, 1800, 1803-1804.

As the game ended, Fish's eleven-year-old son, David Fish, Jr., got in a fistfight in the cul-de-sac with a fourteen-year-old Gus Fernandez. TT 1564, 1568-1569, 1645-1646, 3293-3294. Fernandez was visiting a friend who lived nearby, twelve-year-old Robert Toney. TT 1564. Toney's mother, Sherrie Toney, was the girlfriend of the

[1] "TT" denotes the trial transcript, which is Composite Exhibit 1 to Purycar's Memorandum of Law Supporting Petition for Post-Conviction Relief Pursuant to 28 U.S.C. §2254.

defendant Randolph Wright Puryear. TT 2468. The fight between Fish, Jr. and Fernandez was broken up by another neighbor, Ed Stockton. TT 1646, 3294. After separating the boys, Stockton took Fish, Jr. to the Wall residence where he advised Fish, Sr. that his son had been in a fistfight. TT 1647, 1677, 2174, 3294. Fish, Sr. responded: "Next time, let them fight...That's how he's going to learn to be a man." TT 1677-1678.

b. The second violent encounter

Before Fernandez could leave the cul-de-sac, Fish, Sr. and Wells brought Fish, Jr. outside.[2] TT 1572, 1678, 3303. Fish, Sr. encouraged his son

[2] Fernandez had taken a motorized scooter to the cul-de-sac but was unable to restart it as Fish, Sr., Fish, Jr. and Wells came out of the Wall home. TT 1571-1572.

to resume the fight. TT 1573, 1600, 1648. Fish, Sr. also exhorted Fernandez to fight, yelling: "You want to fight my son, go ahead, you can fight him; go ahead." TT 1648, 1679. Fish, Sr. taunted Fernandez repeatedly calling him a "pussy," TT1600-1601, and telling him: "You got beat by a fifth grader." TT 1874. Stockton found the situation "shocking" and "unbelievable" and felt "disgusted," but he did not intervene. TT 1679.

The two children resumed their fistfight. TT 1880. Fish, Sr. watched the fight while drinking a bottle of beer, TT 1573, occasionally shouting encouragements to his son to "beat the hell out of" Fernandez. TT 1682, 2280. Wells "acted like a referee," TT 2179, 3300, and was

there "so Robby [Toney] wouldn't come in or something like that and help Gus." TT 3299. After Fish, Jr. sustained a bloody nose, Wells broke up the fight and told Fernandez to get out of the cul-de-sac. TT 1603, 1649. Adult Wells also grabbed 12-year-old Toney by the arm and told him "You don't live down here; you need to go on home....You guys don't need to be down here causing problems." TT 1604, 1875-1876. Although he stated at trial he did not recall it, Fish, Jr. testified at a deposition that Wells told him "good fight...next time you get in a fight, charge him." TT 3304-3305.

c. The third violent encounter

Juveniles Fernandez and Toney returned to

Toney's home where Toney told his mother what had happened. TT 1579. Ms. Toney responded by driving to the cul-de-sac. TT 1579. Decedent Wells and Fish, Sr. were still outside when she arrived. Ms. Toney was angry and yelled at Wells, telling him never to touch her son again. TT 1654. Wells approached her door, reached into her vehicle and unlocked her door, and then opened her door. TT 2191. Fish, Sr. felt that this was "unusual" behavior by decedent Wells. TT 2192. As Ms. Toney exited her vehicle, decedent Wells pushed her to the ground. TT1655, 1697, 1814, although the State's witnesses claimed that

Ms. Toney was attempting to attack Wells who merely "pushed her out of the way." TT 1660, 1736, 1814.[3]

Ms. Toney, very upset, climbed back in her car and drove home with a "big gash on her arm" that "kind of looked like road rash" and was bleeding. TT 1611, 2474; 2885. After seeing this incident, Fish, Sr. and Wall both told decedent Wells they thought the police would be coming soon. TT 1815-1816, 2203-2205.

[3] Although he denied it at trial, Fish, Sr.'s statement written the day of the incident described decedent Wells pushing Ms. Toney not once but twice. TT 2197. Ms. Toney's son testified his mother told him Wells first grabbed her by the neck and threw her to the ground, then pushed her down a second time as she was trying to get up. TT 2476. Fernandez heard Ms. Toney tell her son this. TT 1613-1614.

Notwithstanding this expectation, all three men resumed drinking beer. TT 2203-2205.

d. The violent encounter at issue

1. Facts not in dispute

While the first three violent encounters were taking place, Randy Puryear was at the Buccaneers game with a fellow dentist, Dr. James Doerner. TT 2713. After Ms. Toney returned home from the cul-de-sac, she called Puryear on his cell phone and in several short conversations told him what had happened. TT 2718-2720, 2722-2723. Toney advised Puryear that she had called the police and asked him to meet her at the cul-de-sac. TT 2726-2727. Puryear's phone records reflect that his last conversation with

Toney ended at 5:08 p.m., and he testified he arrived at the cul-de-sac within a minute thereafter. TT 2734-2735. A 911 call reported the shot at 5:11 p.m., establishing that no more than three minutes elapsed between Puryear's arrival and the fatal shot. TT 2534.

Puryear entered the cul-de-sac and Fish, Sr. and decedent Wells came out of Wall's house. TT2150-2151. Fish, Sr. approached Puryear in his car and Puryear asked Fish, Sr. what had happened. TT 2219-2221, 2740. Puryear exited his car during this conversation, which was calm and civil. TT 1753, 1821-1822, 2219, 2741-2742. While it was occurring, Edna Lee, a Clearwater police officer who lived on the cul-de-sac, returned

home and saw Puryear talking to Fish, Sr. TT 1882. She saw nothing alarming and entered her home. TT 1882, 1910. After Lee went inside, Puryear asked Fish, Sr. which person had pushed Ms. Toney to the ground. TT 2222. Decedent Wells interjected himself into the conversation, answering Puryear's question "I did." TT 2151, 2222. Decedent Wells then approached Puryear and told him: "You need to get your fucking ass down the road." TT 1755, 2222, 2747.

Although there are variations among the testimony of the nine witnesses who saw portions of what occurred next, the critical evidence can be summarized as follows: all witnesses agreed the situation was calm until decedent Wells told

Puryear he "need[ed] to get his fucking ass down the road." TT 2291, 2558-2559. All of the witnesses testified decedent Wells initiated the physical contact and all agreed that Wells was larger than Puryear. TT 1759-1761, 1824, 1829, 1833, 2155, 2226, 2489, 2491, R 2562-2563, 2896-2898. Given the testimony by both Fish, Sr. and Brian Pieniazak, who is Ms. Toney's oldest son, that they joined in the fray, the ensuing struggle involved four people -- Wells, Puryear, Fish, Sr., and Pieniazek. TT 1767-1768, 1832-1834, 2152, 2231, 2494-2495, 2900-2902, 2941-2944, 3066. Puryear testified he did not have control of the gun at the time it discharged. TT 2783, 2843. This testimony was corroborated and never

rebutted. TT 2570, 2688.

2. The defense version of events

Puryear testified that after Wells told him he "need[ed] to get his fucking ass down the road," he asked Wells: "Who are you?" TT 2748. Wells responded: "Who the fuck do you think you are, some sort of cop or something?" TT 2748. Puryear then said: "Maybe I am. Maybe I'm not. What does that matter?" TT 2748. Puryear testified decedent Wells then charged him and hit him in the left temple with his right fist, breaking Puryear's sunglasses, which flew off his face as Puryear fell to the ground from the blow. TT 2748-2749, 2753-2754. Puryear explained that as

Wells continued trying to attack him, he reached into the open door of his car, pulled out a firearm, stood up, and told Wells to stay away from him. TT 2757, 2764-2765.

Puryear testified decedent Wells was trying to attack him further, but was being restrained by Fish, Sr. TT 2769-2770. Puryear recalled that Wall came out of his house and assisted Fish, Sr. in restraining Wells. TT 2768-2770. Fish, Sr. and Wall convinced Wells to return to Wall's house, and began escorting him in that direction. TT 2670-2671. As Puryear was turning to return to his car, decedent Wells suddenly said "fuck it," broke away from the two men restraining him, and charged Puryear a second time. TT 2770-

2772. Puryear described Wells hitting him from the side, driving him to the pavement, and the two of them fighting for control of the firearm. TT 2773. Puryear recalled decedent Wells yelling during the fight: "I'm going to kill you when I get that gun." TT 2775-2776.

As Fish, Sr. joined the fray trying to gain control of the gun it went off. TT 2778-2779. Puryear testified that the gun was not under his control when it went off,[4] and that he first thought he might have been shot. TT 2783, 2843. He then saw the gun on the pavement and picked it up and put it back in his car as Wells was

[4] A gunshot residue test was performed on Puryear's hands. TT 2069. Not a trace of gunshot residue was found. TT 2069, 2077. Neither Wells nor Fish, Sr. were ever tested for gunshot residue.

surrounded by various neighbors attempting to assist him. TT 2783-2784. Puryear explained that he has a limited memory of the details of the fight and that the next thing he remembered was being arrested by Officer Lee out in the cul-de-sac. TT2783-2785, 2844-2845.

Dr. Doerner corroborated Puryear's testimony. He had followed Puryear in his own vehicle because they planned to attend a social function together that evening and Ms. Toney's neighborhood was on Doerner's way home. TT 2552-2554. Doerner recalled sitting in his car watching Puryear having a calm discussion with Fish, Sr., TT 2558-2559, after which decedent Wells became angry, TT 2561, ran at Puryear,

and punched him in the face, knocking him to the ground. TT 2562-2563. Doerner looked down to dial 911 on his cell phone. TT 2564. When he looked up, he saw Puryear with the firearm telling Wells to back off. TT 2566. Dr. Doerner saw Wells rush Puryear and both men fall to the ground in a struggle in which both had their hands on the gun. TT 2566-2568, 2663-2664, 2684. Doerner heard the gun go off, saw the gun on the ground as the men separated, and then saw Puryear pick it up. TT 2570, 2688. Doerner then saw Puryear arrested by Lee. TT 2571.

Puryear's testimony was also corroborated by Pieniazek, who arrived at the cul-de-sac in time to see Dr. Puryear with the gun out while

decedent Wells was being restrained by two of his neighbors. TT 2484-2487. Pieniazek testified that Puryear was "terrified" while Wells was "angry as hell". TT 2486. Wells was yelling "fucking shoot me" at Puryear. TT 2487. Pieniazek then observed Wells say "fuck it" while breaking free of his restraints and charge Puryear. TT 2489-2491. As Wells made contact with Puryear, the two men fell to the ground in a struggle over the gun. TT 2492. Pieniazek heard Wells screaming "I'm going to fucking kill you" repeatedly during the fight. TT 2493. Pieniazek testified that he joined the fight by jumping on top of Wells in an effort to get him off of Puryear. TT 2494. Pieniazek recalled a fourth person

joining the fray as the gun went off, but was not certain it was Fish, Sr. TT 2494-2495. Piniazek did not see Puryear get up, but saw him put the gun in his car after he stood. TT 2496-2497.

Also corroborating Puryear was Jacob Prevost, a friend of Pieniazek who went to the cul-de-sac with him. TT 2881, 2889-2890. Prevost, like Puryear, Doerner, and Pieniazek, saw Wells break free of restraint and rush Puryear. TT 2896-2898. Prevost also saw both men fall to the ground in a struggle over the gun. TT 2896-2900. Prevost then saw both Fish, Sr. and Pieniazek join the fray as the gun went off. TT 2900-2902. Prevost could not tell who, if anyone, had control of the gun when it fired. TT 2903.

Robert Sanders, another friend of Robert Toney's who also went to the cul-de-sac, arrived in time to see Puryear, Wells, Pieniazek, and Fish, Sr. all on the ground in a fight. TT 2941-2944, 2966. Fish, Jr. similarly described "a big pile" of people in the middle of the cul-de-sac at the time the gun went off. TT 3305.

Puryear presented expert testimony from Dr. Michael Baden, a forensic pathologist,[5] and

[5] Dr. Baden is the chief forensic pathologist for the New York State Police, and is board certified in anatomic pathology, clinical pathology, and forensic pathology. TT 2973-2976. He previously served as the chief forensic pathologist for the United States House of Representatives Select Committee on the Assassinations of John F. Kennedy and Dr. Martin Luther King, Jr. TT 2977.

Dr. Henry Lee, a forensic criminalist with expertise in crime scene reconstruction.[6] Taking into consideration all of the physical evidence, including the bullet trajectory, TT 2988, 3035-3041, 3201-3203, the abrasions and lacerations on Wells' hands and knees, TT 3000-3013, 3221, the damage to Puryear's sunglasses, TT 3207-3209, 3218, and the abrasions on Puryear's elbows and knees, TT 3013-3019, 3221, both experts opined that the evidence was most consistent with a struggle on the ground as described by Puryear, Doerner, Pieniazek, Prevost, and Sanders. TT

[6] Dr. Lee was first chief criminalist for the State of Connecticut and a director of the Connecticut State Police Forensic Lab. TT 3183. He is a member of the faculty at fourteen different universities and graduate schools. TT 3185.

3042-3046, 3222. Puryear also presented an expert toxicologist who opined that a "very conservative" estimate of Wells' blood alcohol level at the time of the incident would be .13. TT 3374.

3. The State's version of events

Wall and Fish, Sr., both drinking with decedent Wells prior to this situation, gave varying descriptions of the events leading up to the gunshot. Their testimony differed with the witnesses that agreed with Puryear's version regarding (i) whether Puryear armed himself before or after Wells initiated physical contact; and (ii) whether the struggle over the gun took place while all four of the combatants were

upright or on the ground. However, both Wall and Fish, Sr. could not rebut the testimony of Puryear and Doerner that Puryear did not have control over the gun when it fired, regardless of the conflict being upright or on the ground. Additionally, both Wall and Fish, Sr. agreed that the physical contact leading to this encounter was solely initiated by decedent Wells, and not Puryear.

Wall claimed that after Wells told Puryear "You need to get your fucking ass down the road," Puryear responded by pulling the gun out of the waistband of his shorts and telling Wells: "Come on, you fucking nigger." TT 1757-1758. Wall admitted that he then tried to restrain Wells but

that Wells broke free of him while saying "fuck it," and then charged Puryear and grabbed the arm holding the gun. TT 1759-1761, 1824, 1829. Wall described Wells and Puryear as approximately the same height, but agreed that Wells was heavier than Puryear. V 12, R 1838. According to Wall, Puryear and Wells never fell to the ground and were still upright struggling over the gun when Peiniazek jumped on Wells' back. TT 1766, 1832-1833. Fish, Sr. then pulled Pieniazek off of Wells at about the time the gun went off. TT 1767-1768, 1833-1834. When the gun went off, he saw Wells, "slump to the ground." TT 1768. Wall testified he then saw

Puryear on the other side of Wells with the gun in his hand. TT 1768. Wall acknowledged that "when the gun went off, [he] could not see who had control th[e] gun when it was fired." TT 1838.

Fish, Sr.'s testimony was like Wall's. However, he did not claim to have seen anything at the time the gun went off because he was busy pulling Pieniazek off of Wells and throwing him onto the ground. TT 2152, 2231. Like Wall and all of the other witnesses, Fish, Sr. confirmed that it was decedent Wells who initiated the physical violence by breaking free of his restraints and charging Puryear to grab the gun. TT 2155, 2227. Fish, Sr., like Wall, claimed that Puryear pulled the firearm from his waistband before there was

physical contact, TT 2151, and that the struggle over the firearm took place while the combatants were standing rather than on the ground.[7] TT 2277-2278.

B. Course of Proceedings in State Court and in District Court

1. Jury Selection

During jury selection, the trial judge sua sponte removed potential jurors from the jury pool without permitting defense counsel an opportunity to attempt to rehabilitate these

[7] Both Dr. Baden and Dr. Lee agreed it was unlikely that the gunshot occurred while Wells was standing as described by Wall and Fish, Sr. TT 3041, 3222-3223.

venire members in violation of both Fla.R.Crim.P. 3030(b) and the Due Process Clause.[8] TT

[8] *Puryear v. State*, 891 So.2d 2, 3 (Fla. 2nd DCA 2004) ("Florida Rule of Criminal Procedure 3.300(b) provides that both counsel for the State and the defendant 'shall have the right to examine jurors orally on their voir dire.' In this case, it was error for the trial court to dismiss the prospective juror without giving Puryear 'an opportunity to question the juror to clarify whether [his] answers to prior questioning indicated an inability to fulfill [his] obligations as a juror'"); *O'Connell v. State*, 480 So.2d 1284, 1287 (Fla. 1985)(holding that trial court's refusal to allow defense counsel to examine excluded death-scrupled jurors on voir dire violated defendant's due process rights where prosecutor had opportunity to question to each juror individually; "This double standard on the part of the trial judge amounted to a violation of due process").

at 1270-1271, 1366-1367, 1469-1471.[9] Defense counsel first asked to approach the trial judge on this issue, and later objected to the process. TT 1271, 1366-1367. The trial judge continued this unlawful process, and the jury pool watched as the State was permitted to question potential jurors and the defense was not. TT 1270, 1366-1367, 1420, 1469-1470, 1471.

During voir dire, Assistant State Attorney

[9] When the defense sought to obtain case law in an attempt to advise the trial judge of the basis for their objections, the trial judge denied that request. TT 1253. When the defense sought to make legal argument and objections regarding jury selection, the trial judge ordered them to make those objections to an empty courtroom after the trial judge left the bench. TT 1345-1346. The defense objected to this, but complied with making legal arguments to a courtroom without a judge present. TT 1407-1412.

Curt Allen asked juror Martinez "is there anything about the charges, anything that has been addressed that makes you think this is not the case for you?" TT at 142. The following then occurred:

> Mr. Martinez: I've been hearing a lot about the case. I'm a dental student.
>
> Mr. Allen: Let me stop you right there. You say you heard a lot about the case, outside sources, outside the courtroom. Let me ask you this: Based upon what you heard outside the courtroom, do you think that there is a chance that the outside information may affect you one way or another in deciding the facts and circumstance of this case?

Mr. Martinez: I've been hearing about it every day.

Mr. Allen: Do you think that that might affect you --

Mr. Martinez: Yeah.

The Court: Mr. Martinez, you can go.

Id.

Immediately after excusing juror Martinez sua sponte without permitting any opportunity for defense counsel to attempt to rehabilitate juror Martinez's fairness to serve as a juror, the trial court called up another juror, Demetra Sherer, to replace juror Martinez in the number 3 seat. *Id.* At this point, defense counsel Richard Escobar asked "Your Honor, may we approach?" in order to object to the trial court's preemptory

dismissal of juror Martinez, but the court denied Mr. Escobar's request to approach. TT at 143.

Later in voir dire, prosecutor Allen asked juror Pullaro "Anything that makes you believe this is not the case for you?" TT at 291. The following then occurred:

> Mr. Pullaro: Yeah, I --
>
> Mr. Allen: Well, what's the nature of -- is it something that you may have heard?
>
> Mr. Pullaro: Yeah, I got a --
>
> Mr. Allen: Let me stop you a second. Is it something that you may have heard through the media?
>
> Mr. Pullaro: No.
>
> Mr. Allen: Without telling us what it is, what is the nature of the information that

you have that causes you concern?

Mr. Pullaro: What is the nature of it, just I know what was going on. I had a friend here yesterday; Mr. Martinez is a very good friend of mine.

Mr. Allen: So he's related information to you?

Mr. Pullaro: Yes, sir.

Mr. Allen: Without telling us any more, do you believe that the information that he related to you causes you concern about being fair to both sides?

Mr. Pullaro: Yes, sir.

The Court: Okay. Mr. Pullaro, you may be excused.

Mr. Escobar: Your Honor, we're going to object to the juror

being excused without inquiry by the defense.

The Court: I have a reasonable doubt he can be fair and impartial.

Mr. Escobar: For the record, we object.

TT at 291-92.

Still later in voir dire, prosecutor Allen asked juror Preston whether "anything that you may have heard or seen or anything that we've talked about thus far makes you think this is not the case for you?" TT at 341. The following then occurred:

Mr. Preston: I didn't hear anything of the case. It would cause some hardship for my employer and other companies because I'm project manager for

certain ongoing projects.

Mr. Allen: Let me put it this way: What if, heaven forbid, you're put on this particular case and you're going to have to miss work, maybe a week, maybe two weeks, maybe a while, do you think that that situation is going to cause you to be distracted and not focus on what's being presented to you?

Mr. Preston: Yes, because me not being there, it would cause delays and cost a large amount of money.

The Court: Mr. Preston, you're excused.

Mr. Escobar: Your Honor, we would object to him being excused without inquiry by the defense.

The Court: Okay. Mr. Preston, you may go.

TT at 341-42.

Earlier in voir dire, juror Lonsdale stated, in response to prosecutor Allen's questions. "I've heard through word of mouth about the case" and "I've already formed an opinion." TT at 341. After juror Preston was excused sua sponte by the trial court, Mr. Allen resumed questioning juror Lonsdale:

Mr. Allen: Regarding Ms. Lonsdale, we can talk to her some more? Okay. Ms. Lonsdale, let me come back to you for just one moment. You said you already formed an opinion. Please don't tell us what that opinion is. Do you think that if you are seated as a juror on this

particular case, that there is a chance, slight or huge, that as you sit there and listen to the evidence what you already know from outside the courtroom is going to affect your ability to evaluate the testimony?

Ms. Lonsdale: I'm not sure.

Mr. Allen: So you can't guarantee us if you listen to the evidence that that outside factor won't come in and help you decide whether or not we proved our case?

Ms. Lonsdale: I can't guarantee.

The Court: The answer is, no, you can't guarantee that?

Ms. Lonsdale: Correct.

The Court: You're excused. You may go.

Mr. Suarez: Same objection, we would object to this juror being excused without proper questioning by the defense.

The Court: Okay.

Despite having made several objections regarding jury selection, defense counsel twice accepted the jury panel, thereby abandoning the legal objections previously made. TT 1467, 1508. At the 3.850 hearing, both trial counsel admitted that they made no tactical decision to abandon these objections. Post-Conviction Hearing Transcript ("PCHT") at 1021, 1038.[10] Trial

[10] The entire 3.850 hearing transcript is attached as Composite Exhibit 2 to Puryear's Memorandum of Law Supporting Petition for Post-Conviction Relief Pursuant to 28 U.S.C. §2254.

counsel attempted to object to the jury seated after opening statements but before the presentation of evidence. TT 1561. The trial judge responded "Okay", but did nothing to strike the panel. TT 1561.

2. The Direct Appeal

Puryear timely appealed his judgment and sentence. His appeal was denied by the Florida Second District Court of Appeal in *Puryear v. State,* 891 So.2d 2 (Fla. 2nd DCA 2004). In that opinion, the Second DCA noted that Fla.R.Crim.P. 3.300(b) "provides that both counsel for the State and the defendant 'shall have the right to examine jurors orally on their voir dire'" and concluded that "it was error for the trial court

to dismiss the prospective juror without giving Puryear 'an opportunity to question the juror to clarify whether [his] answers to prior questioning indicated an inability to fulfill [his] obligations as a juror.'" *Id* at 3.

However, despite the fact that trial counsel "contemporaneously objected to the trial court's dismissal of the prospective juror without inquiry by the defense", the Second DCA held that "by affirmatively accepting the jury without reservation of his earlier objection, Puryear abandoned his objection to the dismissal of the prospective juror." *Id.* Accordingly, the Second DCA affirmed Puryear's convictions despite holding that the trial court had erred by sua

sponte dismissing prospective jurors in violation of Fla.R.Crim.P. 3.300(b).

3. The 3.850 Motion and Appeal

Puryear moved under Fla.R.Crim.P. 3.850 for post-conviction relief raising eight claims of ineffective assistance of counsel. In Ground One, Puryear claimed ineffective assistance of counsel because trial counsel inadvertently failed to preserve objections made during jury selection to the trial court's erroneous summary dismissal of jurors Martinez and Pullaro and juror Preston without permitting inquiry by defense counsel, as the Second DCA recognized in its opinion affirming Puryear's conviction. (PUR 0000371-343). Puryear argued that"[t]rial counsel's failure

to follow the basic trial precept of renewing objections on a timely basis deprived Mr. Puryear of an appellate reversal and new trial." (PUR 0000372-73). The State, in its response to the 3.850 motion, did not argue that defense counsel was not deficient, but merely that Puryear could not establish prejudice because he could not establish that a biased juror served on his jury. The State further argued that under *Carratelli v. State*, 961 So.2d 312 (Fla. 2007), Puryear could not establish prejudice because he could not demonstrate that the outcome of the trial would have been different if trial counsel had preserved their objections made during jury selection.

In its order denying 3.850 relief, the circuit

court relied explicitly on the Florida Supreme Court's *Carratelli* opinion in holding that "an allegation of ineffective assistance of counsel for failure to preserve matters for appeal will not warrant post-conviction relief, as a defendant alleging such will not be able to demonstrate that counsel's deficiency prejudiced the outcome of his trial." The 3.850 court reasoned as follows:

> If a defendant is unable to demonstrate prejudice at trial as a result of counsel's deficiency, he will warrant no relief on his allegation of ineffective assistance of counsel. *See Carratelli,* 32 Fla.L.Weekly S390 (Fla. 2007). Here, Defendant fails to demonstrate that he suffered prejudice at trial as a result of counsel's alleged failure to preserve matters for appeal. As such, Defendant warrants no relief on ground one of his Motion for Post-Conviction Relief.
>
> Puryear timely appealed the circuit court's

denial of his 3.850 motion, but the Second District Court of Appeal issued a per curiam affirmance.

4. The District Court's Denial of Petitioner's Habeas Petition and Denial of a Certificate of Appealability

The district court denied Ground One of Puryear's habeas petition based on its conclusion that "it is the result of the trial, not the appeal, that Puryear must show would have been different." It interpreted the 11th Circuit's opinion in *Carratelli v. Stepp*, 2010 WL 2331421(11th Cir. June 11, 2010) as holding "that there was no clearly established federal law by the Supreme Court specifically addressing whether the federal court should examine the prejudice on appeal rather than at trial in a case like this one." *Id.* at 7.

Applying that prejudice standard, the district court found that "Puryear fails to show that he was prejudiced in the outcome of his trial due to counsel's failure to timely renew his objection to the judge's dismissal of three prospective jurors without allowing defense the opportunity to question them." *Id.* at 8. Accordingly, the district court denied Ground One.

C. Course of Proceedings in the Court of Appeals

The Court of Appeals denied Petitioner's application for a certificate of appealability as follows: "To merit a certificate of appealability, Puryear must show that reasonable jurists would find debatable both (1) the merits of an

underlying claim and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Puryear's motion for a certificate of appealability is DENIED because he has failed to satisfy either prong of the *Slack* test."

STANDARD OF REVIEW UNDER 28 U.S.C. §2254(d)

As amended by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) provides that a state prisoner's application for a writ of habeas corpus based on a legal error adjudicated on the merits in state court proceedings "shall not be granted ... unless the adjudication of the claim ... resulted in a

decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ...."

A state court decision is "contrary to" clearly established federal law if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or (2) a state court confronts facts "materially indistinguishable" from relevant Supreme Court precedent, but reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A

state court decision is an "unreasonable application" of clearly established federal law if the state court unreasonably applies controlling law, or unreasonably extends, or fails to extend, a legal principle from Supreme Court caselaw to a new context. *Id.* at 407. "[A] federal court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively reasonable", rather than merely incorrect. *Id.* at 409.

CLEARLY ESTABLISHED FEDERAL LAW GUARANTEES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees criminal defendants the right to effective assistance of

counsel. Under *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), a successful claim of ineffective assistance of counsel requires a defendant to (1) show that counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms, and (2) show that the deficient performance of counsel served to prejudice his defense. Prejudice will be found when there is a reasonable probability that, but for the deficient performance of counsel, the outcome of the proceeding would have been different. *Id.* at 694. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Id.*

"[W]hen [trial] counsel's constitutionally

deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000).

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. §2253(c)(2)

To obtain a certificate of appealability under 28 U.S.C. 2253(c)(2), Puryear must make "a substantial showing of the denial of a constitutional right." To do so, Puryear need not show that he would prevail on the merits, only that the issues are debatable among jurists of reason, that the Court of Appeals could resolve

the issues in a different manner, or that the questions raised are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

REASON FOR GRANTING THE WRIT

This Court should grant the requested writ of certiorari in order to instruct lower courts that its decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) clearly established that the *Strickland* prejudice inquiry for ineffective assistance of counsel claims need not be restricted to the forum in which the unprofessional conduct occurred.

In *Flores-Ortega*, this Court held that a trial counsel's unprofessional failure to file a

notice of appeal constituted unconstitutionally ineffective assistance of counsel, despite the fact that the unprofessional conduct occurred at the trial level and the prejudice occurred at the appellate level. In order for a mistake by trial counsel to constitute ineffective assistance of counsel when the only effect of that mistake is on the defendant's appeal, as this Court held in *Flores-Ortega*, the *Strickland* prejudice inquiry must logically not be limited merely to errors by trial counsel that effect only the trial, as the district court held below. Rather, errors by trial counsel that preclude an otherwise meritorious appellate claim, whether by failing to file a notice

of appeal as in *Flores-Ortega* or by failing to preserve a meritorious objection to a court's jury selection error as here, clearly constitute ineffective assistance of counsel even though the prejudicial effect of those errors only becomes apparent during the appeal process.

This is not a novel notion. In *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310, 1311-12 (11th Cir. 2003) (per curiam), the 11th Circuit relied on *Flores-Ortega* when deciding that because "trial counsel is acting in an appellate role when he fails to preserve a *Batson* challenge", a court should look to "the outcome of the appeal in determining whether a petitioner was prejudiced when his attorney failed to

preserve his *Batson* claim for appellate review."

The 11th Circuit reasoned:

> As in *Flores-Ortega*, the attorney error Davis identifies was, by its nature, unrelated to the outcome of his trial. To now require Davis to show an effect upon his trial is to require the impossible. Under no readily conceivable circumstance will a simple failure to preserve a claim--as opposed to a failure to make that claim in the first instance--have any bearing on a trial's outcome. Rather, as when defense counsel defaults an appeal entirely by failing to file timely notice [like in *Flores-Ortega*] the only possible impact is on the appeal.
>
> Similarly, in *Shaw v. Dwyer*, 555

F.Supp.2d 1000, 1009 (E.D. Mo. 2008), the district court granted a state prisoner's habeas petition because trial counsel failed to preserve a meritorious gender-based *Batson* claim for appeal. The *Shaw* court held that when trial

counsel's error "impacted not [petitioner's] trial but his appeal", requiring the petitioner to show an effect upon his trial in order to establish prejudice under *Strickland* "is not only factually impossible, but is contrary to clearly established federal law as determined by the Supreme Court" in *Flores-Ortega*.

Lower courts, as in this case, are routinely applying the *Strickland* "outcome of the proceeding" prejudice standard to mean that unprofessional errors by trial counsel must have affected the trial in order to constitute a violation of the Sixth Amendment. But that is not what this Court said in *Strickland*. More importantly,

that erroneous interpretation of *Strickland* flies in the face of the logical principle underlying the *Flores-Ortega* decision. This Court should use this case to instruct lower courts that *Flores-Ortega* means that unprofessional errors by trial counsel which preclude an otherwise meritious appeal do indeed constitute ineffective assistance of counsel in violation of the Sixth Amendment.

CONCLUSION

The Florida Second District Court of Appeal held that Petitioner Puryear would have been entitled to a new trial had his trial counsel properly preserved his previously made objection to the trial court's sua sponte dismissal of a prospective juror without permitting inquiry by

defense counsel. *Puryear v. State*, 891 So.2d 2, 3 (Fla. 2nd DCA 2004). Therefore, this was a clearly meritorious appellate issue which trial counsel inadvertently and unprofessionally abandoned by accepting the jury without properly reserving their earlier objection. Under these circumstances, trial counsel's error of failing to preserve a clearly meritorious appellate issue which would otherwise have resulted in a new trial and the prospect of acquittal is the functional equivalent of trial counsel's failure to file a notice of appeal in *Flores-Ortega*. Indeed, the magnitude of trial counsel's mistake here in one respect exceeds that of trial counsel in *Flores-Ortega* because the success of the appeal

foreclosed in *Flores-Ortega* by counsel's failure to file the notice of appeal was uncertain, while here the Second District Court of Appeal has found that the unpreserved jury selection claim was meritorious.

Petitioner Puryear's ability to obtain the new trial he should have had if his trial counsel had merely renewed their objection prior to the jury being sworn has been frustrated by courts wrongly assuming that the *Strickland* "outcome of the proceeding" prejudice standard established a rigid division between the trial and the appeal in which all trial counsel errors have to be judged against only their effect on the trial. But this

Court rejected that concept in *Flores-Ortega*. Certiorari should be granted here in order to instruct lower courts on a proper understanding of the principle underlying *Flores-Ortega*. That would also have the incidental benefit of perhaps giving Randy Puryear the new trial he should have received in 2004 but for his trial counsel's inadvertent failure to renew their previously made objection to the trial court's improper dismissal of potential jurors.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

RANDOLPH PURYEAR

Petitioner,

vs.

SECRETARY OF FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondents.

CERTIFICATE OF SERVICE

I CERTIFY that on March 29, 2011, a true copy of the Petition for Writ of Certiorari and Appendix has been served by U.S. Mail, postage prepaid upon Patricia McCarthy, Assistant Attorney General, Office of the Attorney General, Concourse Center a, Suite 200, 3507 Frontage Road, Tampa, Florida 33607.

Kevin J. Darken, Esq.
Attorney for Petitioner

APPENDIX

184

(2)

Supreme Court, U.S.
FILED

101198 MAR 29 2011

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

♦

RANDOLPH PURYEAR,
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♦

On Petition for Writ of Certiorari to The United States Court of Appeals
For the Eleventh Circuit

♦

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
PAGES 1 through 59

♦

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
PAGES 1 through 59

TABLE OF CONTENTS

Order of the United States Court of Appeals denying Petitioner's application for a certificate of appealability.

App. 4

District Court's Orders Denying Petitioner's Application for a writ of habeas corpus.

App. 7

Second District Court of Appeals decision in Puryear v. State, 891 So.2d 2 (Fla. 2nd DCA 2004).

App. 36

Post-Conviction Court's decision denying Petitioner's ineffective assistance of counsel claim.

App. 44

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 04 2011
JOHN LEY
CLERK

No. 10-13923-I

RANDOLPH PURYEAR,

Petitioner-Appellant,

versus

SECRETARY FLORIDA DEPARTMENT
OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Randolph Puryear, a Florida prisoner serving a 25 year sentence after convictions for second degree murder, aggravated assault with a weapon, and carrying a concealed firearm, filed a federal habeas petition, pursuant to 28 U.S.C.

§2254. In his petition, he argued that his counsel was ineffective for: (1) failing to renew his prior objections to the trial court's improper dismissal of potential jurors without allowing any inquiry or rehabilitation by defense counsel prior to the swearing-in of the jury; and (2) failing to object to the forcible felony portion of the jury instruction on self-defense. The district court denied the petition, and Puryear's motion for a COA. In his counseled motion for a COA, filed with this Court, Puryear indicates that his appeal is limited to the denial of his first ineffective assistance claim.

To merit a certificate of appealability, Puryear must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. §2253(c)(2); *Slack v.*

McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Puryear's motion for certificate of appealability is DENIED because he has failed to satisfy either prong of the *Slack* test.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RANDOLPH PURYEAR

Petitioner

v. CASE NO.: 8:09-cv-2586-T-30EAJ

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.
_____/

ORDER

Petitioner, Randolph Puryear, ("Puryear") an inmate in the Florida penal system proceeding with counsel, brings this petition for writ of habeas corpus pursuant to 28 U.S.C.§2254 (Dkt. #1). The Court has considered the petition, Respondent's response (Dkt. #15) and Petitioner's reply (Dkt. #18). Upon review, the Court determines that the petition must be denied

because Petitioner has failed to demonstrate that he meets the criteria for relief pursuant to 28 U.S.C. § 2254.

BACKGROUND

Petitioner challenges his convictions for second degree murder, two counts of aggravated assault with a weapon, and carrying a concealed firearm in the Thirteenth Judicial Circuit, Hillsborough County, Florida. *State v. Puryear*, No. 00-CF-015261, 2002 WL 34365679 (Fla. 13th Cir. Dec. 20, 2002). Petitioner was convicted by a jury and adjudicated guilty in accordance with the verdicts. He was sentenced to a mandatory 25-year prison term on the second degree murder count and concurrent five-year prison terms for the remaining convictions.

Petitioner appealed and on August 25, 2004, after briefings and oral arguments, the appellate court affirmed the conviction and sentence. *See Puryear v. State*, 891 So. 2d 2 (Fla. 2d DCA 2004). The court found no reversible error in any of the several issues raised by Petitioner on appeal, but chose to discuss one of those issues– the trial court's violation of Rule 3.300(b) by summarily dismissing jurors without affording the defendant the right to examine jurors orally in voir dire–which is one of the grounds raised by Petitioner in the instant petition for writ of habeas corpus.

The state appellate court acknowledged that it was an "error for the trial court to dismiss the prospective juror without giving Puryear 'an opportunity to question the juror to clarify

whether [his] answers to prior questioning indicated an inability to fulfill [his] obligations as a juror.'" *See id.* at 3, citing *Howard v. State*, 869 So. 2d 725, 726 (Fla. 2d DCA 2004). However, although Puryear's counsel contemporaneously objected to the trial court's dismissal of the prospective juror without inquiry by the defense, he affirmatively accepted the jury without reservation of his earlier objection, thus abandoning his objection and preventing Puryear from raising it on appeal. *See Joiner v. State*, 618 So. 2d 174 (Fla. 1993). Had defense counsel renewed his objection, he would have provided the trial court with a final opportunity to correct its error, dismiss the venire panel, and start over with a new venire panel.

On October 28, 2005, Petitioner filed a motion for post conviction relief under Florida Rules of Criminal Procedure 3.850, raising eight grounds for relief. Two of those grounds are the subject of the present petition–failure of Petitioner's trial counsel to timely restate an objection to the trial court's improper dismissal of three prospective jurors without allowing the defense to inquire of the veniremen, and ineffective assistance for not objecting to the forcible felony portion of the jury instruction on self-defense.

The postconviction court held an evidentiary hearing on grounds one, two, four, six, seven, and eight, in which Puryear, his two trial attorneys, attorney Ronald Cacciatore, and the state prosecutor who prosecuted Puryear's case

were called as witnesses. On October 8, 2007, the postconviction court issued a final order denying Petitioner's Motions for Post Conviction Relief. *See State v. Purvear*, No. 00-15261, 2007 WL 4622468 (Fla. 13th Cir. Oct. 8, 2007).

Petitioner appealed. The state appellate court per curiam affirmed without written decision. *See Purvear v. State*, 11 So. 3d 952 (Fla. 2d DCA 2009) [table].

On December 23, 2009, Petitioner filed the instant 28 U.S.C. § 2254 petition. Petitioner claims that his trial counsel violated his Sixth Amendment right to effective assistance of counsel on two grounds: (1) by failing to restate his objections to the trial court's improper dismissal of potential jurors without allowing any inquiry or rehabilitation by defense counsel prior

to the swearing-in of the jury; and (2) by failing to object to the trial court's self-defense instruction which, according to Petitioner, "erroneously" included a forcible felony exception to the defense (Dkt. No. 1). Respondent acknowledges that the petition is timely, but asserts that Petitioner has failed to demonstrate that he meets the criteria for relief pursuant to 28 U.S.C. § 2254. For the reasons discussed below, the Court agrees.

STANDARD OF REVIEW

Because Petitioner's conviction was entered after the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), his petition is subject to its provisions. The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and ensure that

state-court convictions are given effect to the extent possible under law." *See Bell v. Cone*, 535 U.S. 685, 693 (2002). Thus, the standard of review required in a federal habeas corpus proceeding is "highly deferential," which demands that "state court decisions be given the benefit of the doubt," resulting in a heavy burden on the petitioner to successfully overturn a state court conviction. *See Bell v. Cone*, 543 U.S. 447, 455 (2005).

In cases like Petitioner's, where a state court initially considers the issues raised in the petition and enters a decision on the merits, 28 U.S.C. § 2254(d) governs the review of those claims. *See Penry v. Johnson*, 532 U.S. 782, 792 (2001); *Henderson v. Campbell*, 353 F.3d 880, 889-90 (11th Cir. 2003). Pursuant to 28 U.S.C. § 2254(d), habeas relief may not be granted with

respect to a claim adjudicated on the merits in a state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Whether a state court's decision was "unreasonable" must be "assessed in light of the record the court had before it." *See Holland v. Jackson*, 542 U.S. 649, 652 (2004). A factual finding by a state court is presumed to be correct, and a petitioner must rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(d)(2); *Henderson v. Haley*, 353 F.3d 880, 890-91 (11th Cir. 2003).

DISCUSSION

Petitioner contends that his trial counsel violated his Sixth Amendment right to effective assistance on two grounds. In ground one, Petitioner claims that his trial counsel was ineffective by failing to timely restate his objection (prior to the swearing-in of the jury) to three prospective jurors being stricken without allowing defense counsel an opportunity to question them. Petitioner contends that he was prejudiced by his counsel's deficiency in failing to preserve the objection for appeal because it deprived him of an appellate reversal and a new trial. *See Howard v. State*, 869 So. 2d 725, 727 (Fla. 2d DCA 2004). (Dkt. No. 1 at 9).

The Sixth Amendment guarantees criminal defendants the right to effective counsel.

According to *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), a successful claim of ineffective assistance of counsel requires a defendant to: (1) show that counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) show that the deficient performance of counsel served to prejudice his defense. Prejudice will be found when there is a reasonable probability that, but for the deficient performance of counsel, the outcome of the proceeding would have been different. *Id.* at 694. In determining prejudice, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

Here, it is the result of the appeal that is being challenged. The appeal was denied and

Puryear claims that, but for his counsel's error, it would have succeeded. Petitioner likens the circumstances surrounding his petition to those of the petitioner in *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). In *Flores-Ortega*, however, the counsel's error (failure to file a notice of appeal) occurred after the judgment of conviction was entered. Puryear's case involves an alleged error that occurred during trial. Therefore, it is the result of the trial, not the appeal, that Puryear must show would have been different.

In arguing the result of the appeal is the proper focus, Petitioner cites *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003). Petitioner's reliance on *Davis*, however, is misplaced. In *Davis*, the petitioner argued that his trial attorney was ineffective for

failing to preserve a *Batson* claim for appeal. In deciding *Davis*, the Eleventh Circuit did not apply § 2254(d)(1) deference to the state court's ruling because the state court did not resolve the merits of the case. *Id.* at 1313. Therefore, the standard of review for *Davis* was *de novo*, which is different from Puryear's case, where we review whether the state court's decisions were contrary to or an unreasonable application of clearly established federal law.

Contrary to Puryear's contention, the state courts properly applied federal law in resolving his ineffective assistance of counsel claim. As established by *Strickland*, to determine prejudice for postconviction relief, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."

Id. at 696. In a case like Puryear's, *Carratelli v. Stepp*, No. 09-13349, 2010 WL 2331421 (11th Cir. June 11, 2010), the petitioner claimed his counsel was ineffective because he raised an objection to jury selection but failed to properly preserve it for appeal. The petitioner in *Carratelli* also cited *Flores-Ortega* to demonstrate that the *Strickland* prejudice inquiry that focuses on the forum where it occurred is not always applied. The Eleventh Circuit, however, distinguished *Flores-Ortega* from a situation, such as this one, where the issue was raised but not properly preserved. Thus, the Eleventh Circuit held that there was no clearly established federal law by the Supreme Court specifically addressing whether the federal court should examine the prejudice on appeal rather than at trial in a case like this one. Accordingly,

the court held that the district court correctly affirmed the state court decisions holding that the relevant prejudice inquiry should focus on the trial, not on appeal. *Id.* at 3.

This Court has applied the *Carratelli* standard to a federal habeas petition alleging ineffective counsel at trial where counsel failed to renew his objection to the judge's dismissal of jurors without allowing defense counsel an opportunity to question them. *See Acker v. Secretary for the Department of Corrections*, 2009 WL 1149438 (M.D. Fla. April 28, 2009). In *Acker*, like Puryear's case, the proceeding "whose result [wa]s being challenged" was the trial, where counsel failed to renew his objection to the judge's dismissal of jurors.

Puryear fails to show that he was prejudiced in the outcome of his trial due to counsel's failure to timely renew his objection to the judge's dismissal of three prospective jurors without allowing defense the opportunity to question them. Had counsel questioned the three jurors, we do not know that any of them would have survived cause or peremptory challenges to actually serve on the jury, much less whether the outcome of the trial would have been different. It is Puryear's burden to show the outcome of the trial would have been different and he has not carried that burden. *See Acker* at 11. Therefore, ground one will be denied.

In ground two, Petitioner contends that his trial counsel rendered ineffective assistance by not objecting to the "forcible felony" portion of the

jury instruction on self defense. At the time of Petitioner's trial, the forcible felony exception language was part of the pattern self-defense instruction. The Florida Supreme Court later removed it from the pattern instruction in 2006, saying that the forcible-felony instruction should be given "only if the defendant is charged with more than one forcible felony." *See In re Standard Jury Instructions In Criminal Cases*, No. SC05-1621, 930 So. 2d 612, 614 (Fla. 2006) (citing *Giles v. State*, 831 So. 2d 1263 (4th DCA 2002) (holding that when a defendant is not engaged in a separate felonious act at the time of the alleged aggravated battery, the forcible-felony instruction is circular and confusing to the jury such that it basically negates the defense).

But the standard for ineffective assistance requires that Petitioner demonstrate that no objectively reasonably competent lawyer would have foregone the proposed objection based on state law. Reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop. *See Reutter v. Secretary for the Department of Corrections*, 232 Fed. Appx. 914, 916-917 (11th Cir. 2007) (unpublished), (citing *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994)). Therefore, Petitioner's trial counsel here was not deficient for failing to object to the instruction.

Ground two fails for another reason as well. The forcible felony instruction is still given as the pattern instruction when a defendant, like

Puryear, is claiming self-defense, as long as the defendant is engaged in another, independent "forcible felony" at the time. *See Marshall v. State*, 604 So. 2d 799, 803 (Fla. 1992). The proper test for determining the applicability of the instruction is not whether the self-defense act itself could qualify as a forcible felony, but whether, at the time of the self defense, the accused was engaged in a separate forcible felonious act. *See Giles v. State*, 831 So. 2d 1263, 1266 (Fla 4th DCA 2002) (citing *Perkins v. State*, 576 So. 2d 1310, 1311 (Fla. 1991)).

In Petitioner's case, for the forcible felony instruction to apply, the two aggravated assault felonies had to be independent forcible felonies (separate from the act of murder for which the accused is claiming self-defense). The two

aggravated charges stemmed from a four person altercation occurring between Petitioner, the murdered victim and two witnesses. The jury convicted Puryear of the two aggravated assault charges. To do so, the jury had to find that they were separate forcible felonies. The forcible felony exception is therefore applicable to the self-defense instruction given in Puryear's case.

And, regardless of whether or not the two aggravated assault charges were separate and independent from the act for which Petitioner is claiming self-defense, he fails to demonstrate the prejudicial effects of the allegedly erroneous forcible felony instruction. Even if it had been an error to read the forcible felony instruction, it is only a "fundamental error when it deprives the defendant of a fair trial." *Martinez v. State* at

457, (citing *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988)). To appraise the significance of an error in the jury instructions requires a comparison of the instructions actually given with those that should have been given. To prove a significant error, Petitioner must demonstrate that the forcible felony instruction so infected the entire trial that the resulting conviction violates due process. *See Henerson v. Kibbe*, 431 U.S. 145, 154 (1977). Petitioner fails to demonstrate that the erroneous instruction so infected the entire trial, and given the opportunity in his rule 3.850 proceeding, he failed to demonstrate that had his counsel objected to the forcible felony portion of the instruction there would have been a reasonable probability of a different outcome at trial.

An erroneous jury instruction here would have been harmless because there is ample evidence from which a rational jury could conclude that Petitioner was not justified in the use of deadly force by any definition. By pleading self-defense, Petitioner put before the jury the credibility of his account of the threat he felt and the reasonableness of his reaction to it. *See House v. Lavoie*, 843 F. 2d 474 (11th Cir. 1988). In Petitioner's case, there was evidence that he armed himself with a weapon in an altercation with an unarmed victim where he had ample opportunity to avoid the use of such deadly force. In light of such evidence, a reasonable jury could conclude that self-defense did not justify Petitioner's deadly use of force, regardless of

whether or not he was engaged in a separate forcible felony.

Applying the required deference under AEDPA, it is objectively reasonable to conclude that based on the compelling evidence of his guilt, there was no reasonable probability of a different outcome had Petitioner's counsel objected to the forcible felony instruction. The state decision resulted in a reasonable application of *Strickland* under either prong and a reasonable determination of the facts in light of the evidence. Therefore, ground two will be denied.

CONCLUSION

For the foregoing reasons, the Court finds that Petitioner has failed to establish that he is entitled to federal habeas relief.

It is therefore ORDERED AND ADJUDGED that:

1. The petition for writ of habeas corpus (Dkt. #1) is DENIED.

2. The Clerk is directed to enter judgment in favor of Respondent and against the Petitioner, terminate any pending motions, and close this file.

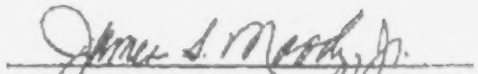
CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). Id. "A [COA] may issue...only if the applicant has made a

substantial showing of the denial of a constitutional right." Id. at § 2253(c)(2). To make such a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Petitioner has not made the requisite showing in these circumstances.

Finally, because Petitioner is not entitled to a COA, he is not entitled to appeal in forma pauperis.

DONE and **ORDERED** in Tampa, Florida on July 27, 2010.



JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RANDOLPH PURYEAR

Petitioner

v. CASE NO.: 8:09-cv-2586-T-30EAJ

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.
_____/

ORDER

Before the Court is Petitioner's Application for Certificate of Appealability Pursuant to 28 U.S.C. § 2253and FRAP 22 ("application") (Dkt. 22). "A certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(C)(2). To make such a showing, Petitioner

"must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)).

When the Court denied Petitioner's 28 U.S.C. § 2254 petition, it also determined that Petitioner was not entitled to a certificate of appealability (see Dkt. 19 at pgs. 11-12).[1] Nothing in Petitioner's application convinces the

[1] See Rule 11(a), Rules Governing Habeas Corpus Cases under Section 2254 (2009) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.").

Court that Petitioner has made a substantial showing of the denial of a constitutional right.

Accordingly, the Court **ORDERS** that Petitioner's Application for Certificate of Appealability Pursuant to 28 U.S.C. § 2253 and FRAP 22 (Dkt. 22) is **DENIED**.

DONE and **ORDERED** in Tampa, Florida on September 20, 2010.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

SA:sfc
Copy to: Counsel of Record

891 So.2d 2
District Court of Appeal of Florida,
Second District.

Randolph Wright PURYEAR, Appellant,
v.
STATE of Florida, Appellee.
No. 2D03-117.Aug. 25, 2004.Rehearing Denied
Jan. 21, 2005.

Synopsis

Background: Defendant was convicted in the Circuit Court, Hillsborough County, J. Rodgers Padgett and Ronald N. Ficarrotta, JJ., of second-degree murder with firearm, two counts of aggravated assault with firearm, and carrying concealed weapon. He appealed.

Holdings: The District Court of Appeal, Paul W. Danahy, Senior Judge, held that:

1 trial court was required to give defendant opportunity to question prospective juror before it

dismissed juror for cause, and

2 defendant abandoned any objection to trial court's dismissal of juror.

Affirmed.

West Headnotes (2)

1 **Jury**⟵Extent of Examination

Prior to dismissing prospective juror for cause, trial court was required to give defendant opportunity to question juror to clarify whether juror's answers to prior questioning indicated inability to fulfill obligations as juror.

West's F.S.A. RCrP Rule 3.300(b).

2 **Jury**--Acceptance of Juror as Waiver of Challenge

Defendant abandoned any objection to trial court's dismissal of prospective juror for cause when he affirmatively accepted jury without reserving his earlier objection at time that juror was dismissed; acceptance of jury reasonably indicated that defendant was satisfied with jury, and trial court was not provided with final opportunity, before jeopardy attached, to correct its error in dismissing juror without giving defendant opportunity to question juror.

Attorneys and Law Firms

**3* James E. Felman, Stuart C. Markman, and Katherine Earle Yanes of Kynes, Markman &

Felman, P.A., Tampa, for Appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee and Deborah Fraim Hogge, Assistant Attorney General, Tampa, for Appellee.

Opinion

DANAHY, PAUL, W., Senior Judge.

Randolph Wright Puryear appeals his convictions for second-degree murder with a firearm, two counts of aggravated assault with a firearm, and carrying a concealed weapon. We find no reversible error in any of the several issues he raises. Accordingly, we affirm his convictions and sentences. In doing so we discuss one of the issues he raises.

Puryear was tried by jury. During voir dire, one of the prospective jurors advised that he had

received information about the case which caused him concern as to whether he could render a fair and impartial verdict. Puryear objected to the trial court's excusing the prospective juror for cause without first giving the defense an opportunity to examine him. Following voir dire, however, defense counsel affirmatively accepted the jury panel without reservation of his prior objection.

1 2 Florida Rule of Criminal Procedure 3.300(b) provides that both counsel for the State and the defendant "shall have the right to examine jurors orally on their voir dire." In this case, it was error for the trial court to dismiss the prospective juror without giving Puryear "an opportunity to question the juror to clarify whether [his] answers to prior questioning indicated an inability to

fulfill [his] obligations as a juror." *Howard v. State*, 869 So.2d 725, 726 (Fla. 2d DCA 2004); *see also Melendez v. State*, 700 So.2d 791 (Fla. 4th DCA 1997). Although Puryear contemporaneously objected to the trial court's dismissal of the prospective juror without inquiry by the defense, we hold that, by affirmatively accepting the jury without reservation of his earlier objection, Puryear abandoned his objection to the dismissal of the prospective juror.

In *Joiner v. State*, 618 So.2d 174 (Fla.1993), defense counsel objected to the State's peremptorily striking a black prospective juror, and the trial court erroneously found that the strike was race neutral. However, the *Joiner* court held that, in affirmatively accepting the jury without reservation of his previous *Neil*l

objection, it was reasonable to assume that counsel had abandoned the objection. *See Joiner*, 618 So.2d at 176. The court stated: "It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn." 618 So.2d at 176. In both *Joiner* and the present case, defense counsel affirmatively accepted the jury without reservation of the earlier objection. In the present case, as in *Joiner*, it is reasonable to conclude that counsel was satisfied with *4 the jury about to be sworn. We also note that *Lavin v. State*, 754 So.2d 784 (Fla. 3d DCA 2000), has extended the rule enunciated in *Joiner* to other jury selection issues. Furthermore, jeopardy attaches in a jury trial when the jury is sworn. *See Allen v. State*, 52 Fla. 1, 41 So. 593, 594

(1906). Had defense counsel renewed his objection, this would have provided the trial court with a final opportunity to correct its error, dismiss the venire panel, and start over with a new venire panel.

1 *State v. Neil*, 457 So.2d 481 (Fla.1984), *clarified*, *State v. Castillo*, 486 So.2d 565 (Fla.1986).

Affirmed.

SALCINES and SILBERMAN, JJ., Concur.

Parallel Citations

29 Fla. L. Weekly D1950

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IN THE THIRTEENTH JUDICIAL CIRCUIT
COURT FOR HILLSBOROUGH COUNTY,
FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

Plaintiff,

CASE NO.: 00-15261
DIVISION: G

v.

RANDOLPH PURYEAR,

Defendant.
_____/

FINAL ORDER DENYING MOTIONS FOR POST-CONVICTION RELIEF

THIS MATTER is before the Court on Defendant's Motion for Post-Conviction Relief, filed on October 28, 2005; Correction to 3.850 Motion, filed November 15, 2005; Addendum to Motion for Post-Conviction Relief, filed November 15, 2005; Notice of Supplemental Authority, filed January 10, 2007; Second Addendum to Motion

for Post-Conviction Relief, filed on May 7, 2007; and Supplemental Memorandum of Law, filed September 19, 2007 (collectively, Defendant's Motions for Post-Conviction Relief). On June 28, 2007, and July 2, 2007, the Court held an evidentiary hearing on grounds one, two, four, six, seven, and eight of those Motions. After reviewing Defendant's Motions, the hearing transcript, the court file, and the record, the Court finds as follows:

In ground one of his Motions, Defendant alleges ineffective assistance of counsel for failure to restate his objections to the trial court's improper summary dismissal of jurors before defense counsel had conducted any inquiry. Specifically, Defendant contends that, although

counsel objected initially to the dismissals, he then failed to renew that objection. On appeal, the Second District Court of Appeal held that counsel's failure to renew this objection amounted to an abandonment of the earlier objection, and thus the issue was not preserved for appeal. *See Puryear v. State*, 891 So. 2d 2, 3 (Fla. 2d Dist. Ct. App. 2004). Defendant alleges, therefore, that counsel was deficient for failing to preserve this issue for appeal by restating his objections to the trial court. The Court notes that, in a recent opinion, the Florida Supreme Court explained that an allegation of ineffective assistance of counsel for failure to preserve matters for appeal will not warrant post-conviction relief, as a defendant alleging such will not be able to demonstrate that counsel's deficiency prejudiced

the outcome of his *trial. See Carratelli v. State, 32* Fla. L. Weekly S390 (Fla. 2007). "The purpose of the right to effective assistance of counsel is to `ensure a fair trial,' and thus, a defendant alleging ineffective assistance of counsel "must demonstrate prejudice at the *trial,* not on *appeal."* *Carratelli v. State,* 32 Fla. L. Weekly S390 **16, 24 (Fla. 2007) (emphasis added) *(citing Strickland v. Washington, 466 U.S. 668, 686* (1984)). If a defendant is unable to demonstrate prejudice at trial as a result of counsel's deficiency, he will warrant no relief on his allegation of ineffective assistance of counsel. *See Carratelli,* 32 Fla. L. Weekly S390 (Fla. 2007). Here, Defendant fails to demonstrate that he suffered prejudice at trial as a result of counsel's alleged failure to preserve matters for appeal. As such, Defendant warrants

no relief on ground one of his Motion for Post-Conviction Relief.

In ground two of his Motions, Defendant alleges ineffective assistance of counsel for failure to call two witnesses. Specifically, Defendant contends that counsel was deficient for failing to call as witnesses Sherrie Toney and Robert Toney, as both were available to testify and would have contradicted testimony from the State's witnesses at trial. At the evidentiary hearing, Defendant failed to present any evidence to support his allegation as it pertains to Robert Toney. As such, Defendant failed to meet his burden, and thus warrants no relief on his allegation as it pertains to that witness. *See Ferrell v. State*, 918 So.2d 163, 173 (Fla. 2005); *see also Gore v. State*, 846 So.2d 461, 469-470 (Fla. 2003) (holding, in

part, that defendant failed to prove his ineffectiveness claim by failing to present any evidence at the evidentiary hearing from witnesses he claimed would be helpful).

Additionally, at the evidentiary hearing, Defendant's trial attorneys testified that they considered calling Sherrie Toney as a witness, but then made the strategic decision not to call her to testify. (*See* Transcript, June 28, 2007, pp. 71-73; Transcript, July 2, 2007, pp. 16, 20, attached). Specifically, the attorneys testified that they chose to not call her as a witness because her testimony would have been that Defendant had the firearm in his waistband or belt, and that this testimony would have been damaging to Defendant as it would have contradicted *his*

testimony and corroborated the State's witness' testimony. (*See* Transcript, June 28, 2007, pp. 71-73, 96; Transcript, July 2, 2007, pp. 6., 16-18, 20, attached). The Court finds this testimony to be credible, and finds the attorneys' decision not to call Sherrie Toney as a witness to be a strategic one that this Court will not second-guess. *See Johnson v. State, 769 So.* 2d *990, 1001* (Fla. 2000); *see also Occhicone v. State,* 768 So. 2d 1037, 1048 (Fla. 2000) (explaining that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"). As such, the Court finds that Defendant warrants no relief on his allegation as it pertains to this witness.

Additionally in ground two of his Motions, Defendant alleges ineffective assistance of counsel for failing to call Defendant to testify as the last witness. Specifically, Defendant contends that counsel was deficient for calling him as the third witness, rather than calling him as the final witness. At the evidentiary hearing, counsel testified that his decision to call Defendant as the third witness was a strategic decision. *(See* Transcript, June 28, 2007, pp. 97-98, attached). The Court finds this testimony to be credible, and finds that it will not second-guess counsel's strategic decision. *See Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000). As such, the Court finds that Defendant warrants no relief on ground two of his Motions for Post-Conviction Relief.

In ground four of his Motions, Defendant alleges ineffective .assistance of counsel for failure to object to improper arguments made by the prosecutor. Specifically, Defendant contends that, in his closing argument, the prosecutor called for sympathy for the victim's wife and children; frequently made race a core principal; belittled the defense's expert witness; maligned Defendant's position as a doctor; and accused Defendant of testifying falsely. The Court notes that, on appeal, Defendant raised the issue of prosecutorial misconduct, however, the Court granted Defendant an evidentiary hearing on counsel's alleged deficiency for failure to object to any prosecutorial misconduct that was not the subject of the direct appeal. At the evidentiary hearing, counsel testified that his decision not to

object to the State's closing argument was both a matter of strategy as well as *habit. (See* Transcript, June 28, 2007, pp. 73-74, attached). The Court finds counsel's testimony to be credible, and finds that it will not second-guess counsel's strategic decision not to object to the State's closing argument. *See Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000). As such, the Court finds that Defendant warrants no relief on ground four of his Motions for Post-Conviction Relief.

In ground six of his Motions, Defendant alleges ineffective assistance of counsel during jury selection. Specifically, Defendant contends that counsel (1) ignored the recommendations of the jury selection expert; (2) should have preserved an objection when the Court denied counsel time to recess to consult with the expert,

(3) should have preserved an objection when the Court denied the expert permission to sit at counsel's table; (4) should have objected to the prosecutor's posing of a hypothetical question to the venire; (5) should have exercised all available peremptory challenges; and (6) should have preserved an objection when the trial judge done so. As such, Defendant warrants no relief on ground six (44) of his Motions for Post-Conviction Relief.

In ground six (5) of his Motions, Defendant alleges ineffective assistance of counsel for failure to exercise all available peremptory challenges during jury selection. However, an allegation of ineffective assistance of counsel for failure to exercise all available peremptory challenges is without merit, as "[n]on statute, rule, or case law

requires a defense attorney to exercise all peremptory strikes," *Phillips Y. State*, 894 So. 2d 28, 36 (Fla. 2004). As such, Defendant .warrants no relief on ground six (5) of his Motions for Post-Conviction Relief.

In ground seven of his Motions, Defendant alleges ineffective assistance of counsel for failure to object to the trial court's jury instructions on self-defense. Specifically, Defendant contends that the trial court explained the elements of justifiable and excusable homicide only once as a general instruction, but failed to distinguish this defense as it related to the different charges within the Information. At the evidentiary hearing g, the attorneys testified that, at the time ell, the jury instruction was read, they believed it

was the proper standard jury instruction on self defense.

(*See* Transcript, June 28, 2007, pp. 75, 100; Transcript, July 2, 2007, pp. 7, 9, attached). The Court notes that, although case law later changed the wording of this standard instruction, at the time it was read to the jury in Defendant's case, it was still proper. *See Giles v. State*, 831 So. 2d 1263, (Fla. 4th DCA 2002). The Court finds that, as the instruction was proper at the time it was read to the jury, counsel cannot be deemed deficient for failing to object to the instruction. As such, Defendant warrants no relief on ground seven of his Motions for Post-Conviction Relief.

In ground eight of his Motions; Defendant alleges cumulative error. However, as this Court has found that Defendant warrants no relief on

his allegations of individual error, so too must his allegation of cumulative error fail. *See Bryan v. State*, 748 So. 2d 1003, 1008 (Fla. 1999) (explaining that, "where allegations of individual error are found without merit, a cumulative-error argument based thereon must also fail."), *see also Griffin v. State*, *866* So.2d 1, 22 (Fla. 2003). As such, Defendant warrants no relief on ground eight of his Motions for Post-Conviction Relief.

It is therefore **ORDERED AND ADJUDGED** that grounds one, two, four, six, seven, and eight of Defendant's Motions for Post-Conviction Relief are hereby **DENIED**.

Defendant has thirty (30) days from the date of this Order within which to file an appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this day of October, 2007.

ORIGINAL SIGNED
OCT 0 8 2007
ANTHONY K. BLACK
CIRCUIT JUDGE

ANTHONY K. BLACK, Circuit Judge

Attachments:
Transcript, June 28, 2007
Transcript, July 2, 2007

CERTIFICATE OFSERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished to Arthur Eggers, 806 East Jackson Street, Tampa, Florida 33602, by regular U.S. Mail; to Douglas Covington and Renee Muratti, Assistant State Attorneys, 800 East Kennedy Boulevard, Tampa, Florida 33602, by inter-office mail; and to Theda James, Assistant Public Defender, 700 East Twiggs Street, Tampa,

Florida 33602, by inter-office mail on this ___ day of October, 2007.

COPY MAILED

OCT 0 9 2007

SUSAN ANDERS
Judicial Assistant

Susan Anders, Judicial Assistant